

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

_____)	
In the Case of:)	DATE: October 9, 2007
)	
Rosewood Care Center)	
of Inverness,)	
)	
)	
Petitioner,)	Civil Remedies CR1592
)	App. Div. Docket No. A-07-110
))	
- v. -)	Decision No. 2120
)	
Centers for Medicare &)	
Medicaid Services.)	
_____)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Rosewood Care Center of Inverness (Rosewood), a skilled nursing facility, appealed the April 30, 2007 decision of Administrative Law Judge (ALJ) Steven T. Kessel. The decision granted summary disposition for the Centers for Medicare & Medicaid (CMS), and upheld CMS's determination to impose civil money penalties of \$300 per day from January 6 through March 2, 2006, based on state agency survey findings that Rosewood failed to comply substantially with Medicare conditions of participation. Rosewood Care Center of Inverness, DAB CR1592 (2007) (ALJ Decision).

On appeal, Rosewood contests the ALJ's conclusion that it was not in compliance with the condition of Medicare participation at 42 C.F.R. § 483.13(c) (duty to promptly and thoroughly investigate incidents of potential mistreatment, neglect, and abuse), and also seeks a reduction in the amount of the civil money penalties (CMPs). Rosewood's Request for Review to the Appellate Division of the Departmental Appeals Board of an ALJ Decision (Pet. Request for Review). According to Rosewood, the ALJ erred in declining to construe its investigation of a November 16 injury involving Resident #2 as a sufficient response to the report of

the same resident's broken clavicle on November 21, 2005. Id. at 8-11. In addition, Rosewood claims that the scope and severity of any noncompliance with section 483.13(c), as well as of its undisputed noncompliance with five other Medicare requirements, are too limited to justify the penalties of \$300 per day that CMS imposed. Id. at 2. Therefore, Rosewood argues, the amount of the CMPs was unreasonable and should be reduced.

For reasons explained fully below, we conclude that Rosewood has not shown any legal error in the ALJ Decision, and that all of the ALJ's findings of fact are supported by substantial evidence in the record. Consequently, we affirm the ALJ Decision in full.

Applicable Legal Authority

Long-term care facilities (including skilled nursing facilities) participating in the Medicare and Medicaid programs are subject to the survey and enforcement procedures set out in 42 C.F.R. Part 488, subpart E, to determine if they are in substantial compliance with applicable program requirements which appear at 42 C.F.R. Part 483, subpart B. "Substantial compliance" means a level of compliance such that "any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301.¹ "Noncompliance," in turn, is defined as "any deficiency that causes a facility to not be in substantial compliance." Id.

A long-term care facility found not to be in substantial compliance is subject to various enforcement remedies, including per-day CMPs. 42 C.F.R. §§ 488.402(c), 488.408. CMS may impose CMPs ranging from \$3,050 - \$10,000 per day for one or more deficiencies constituting immediate jeopardy and from \$50 - \$3,000 per day for deficiencies that do not constitute immediate jeopardy but that either cause actual harm or have the potential for more than minimal harm. 42 C.F.R. § 488.438(a). The regulations set out a number of factors that CMS considers in determining the amount of a CMP. 42 C.F.R. §§ 488.438(f), 488.404. These factors are the facility's history of noncompliance (including repeated deficiencies), its financial condition, its degree of culpability for the cited deficiencies, the seriousness of the noncompliance, and the relationship of one deficiency to the other deficiencies resulting in noncompliance. Id.

¹ We cite to the 2006 Code of Federal Regulations throughout this decision; all the relevant regulations were unchanged during the times at issue here.

The regulation at 42 C.F.R. § 483.13(c), which governs the only finding of noncompliance disputed in this appeal, provides in pertinent part:

(c) *Staff treatment of residents.* The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents

(2) The facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, . . . are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency).

(3) The facility must have evidence that all alleged violations are thoroughly investigated, and must prevent further potential abuse while the investigation is in progress.

(4) The results of all investigations must be reported to the administrator or his designated representative and to other officials in accordance with State law (including to the State survey and certification agency) within 5 working days of the incident, and if the alleged violation is verified appropriate corrective action must be taken.

(Emphasis added.)

Case Background²

The Illinois Department of Public Health (IDPH) surveyed Rosewood for compliance with Medicare participation requirements on January 6 and February 9, 2006 (January and February surveys). The January survey found that Rosewood was not in substantial compliance with two Medicare participation requirements, 42 C.F.R. § 483.13(c)(3) (duty to investigate) and 42 C.F.R.

² The information in this section is drawn from the ALJ Decision and the record before the ALJ, and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact or conclusions of law.

§ 483.25(h)(2) (duty to ensure adequate supervision and assistance devices to prevent accidents).

The February survey found that Rosewood was not in substantial compliance with five additional Medicare participation requirements, which are listed below in our discussion. CMS concurred with the survey findings and imposed CMPs in the amount of \$300 per day, beginning on January 6 and continuing through March 2, 2006, for a total of \$16,800.

On June 26, 2006, Rosewood appealed the findings of noncompliance in the January and February surveys, requesting an ALJ hearing. In November and December, 2006, the parties filed pre-hearing exchanges, including briefs, proposed exhibits, and the written direct testimony of all their proposed witnesses. The hearing was scheduled to take place on May 21, 2007. On March 6, 2007, CMS moved for summary disposition on one of the two deficiencies found in the January survey and all five of the deficiencies found in the February survey. Rosewood opposed the motion, but did not dispute the facts that CMS relied on in support of the motion.³

ALJ Decision

On April 30, 2007, the ALJ granted CMS's motion for summary disposition, finding no disputed issues of material fact; upholding the January survey finding of noncompliance with section 483.13(c)(3); and also upholding all five of the February survey findings of noncompliance. ALJ Decision at 3-6. The ALJ also sustained the imposition of CMPs in the amount of \$300 per day from January 6 through March 2, 2006. Id. at 7-8.

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence, and a disputed conclusion of law to determine whether it is erroneous. South Valley Health Care Center, DAB No. 1691, at 2 (1999), aff'd, South Valley Health Care Ctr. v. HCFA, 223 F.3d 1221 (10th Cir. 2000); *Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in*

³ CMS did not move for summary disposition on the second deficiency cited in the January survey, the accidents deficiency (42 C.F.R. § 483.25(h)(2)). CMS's Motion for Summary Disposition; ALJ Decision at 3, 8. Thus, this part of the January survey is not at issue in this appeal.

the Medicare and Medicaid Programs (at <http://www.hhs.gov/dab/guidelines/prov.html>). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). We review *de novo* the legal issue of whether the ALJ's grant of summary disposition was appropriate. Lebanon Nursing and Rehabilitation Center, DAB No. 1918, at 4 (2004).

Discussion

Rosewood makes three arguments in contesting the ALJ Decision. First, Rosewood contends that the ALJ erred in upholding the January survey finding that it could not show it had timely investigated Resident #2's injury.⁴ Rosewood asserts that the ALJ erred by "fail[ing] to give any credit to Rosewood's position that its investigation done when R2 [Resident #2] bumped her shoulder on the door frame on November 16, 2005, was an investigation of R2's broken clavicle reported by the hospital on November 21, 2005." Pet. Request for Review at 8. In this regard, Rosewood argues that the ALJ wrongly granted summary disposition based on "an interpretation of the facts" adverse to Rosewood. Id. at 1, 8-9.

Second, Rosewood argues that it did in fact conduct an investigation of this injury after December 27, when it learned from a state surveyor that Resident #2 had complained that she had been pulled by the arms by facility staff. Id. at 6. Third, Rosewood argues that the CMPs of \$300 per day should be reduced. Id. at 2.⁵ We reject each of these three arguments, for the reasons explained below.

⁴ For privacy reasons, the resident is identified here only by the number applied by the surveyors.

⁵ With respect to the five deficiencies cited in the February survey, Rosewood conceded the deficiencies before the ALJ but argued they were *de minimis*. Rosewood's Pre-Hearing Brief at 8-9. Rosewood contested only the amount of the CMPs. Id. On appeal, Rosewood expressly reiterates that while it "has not contested the allegations in the Feb. 9, 2006 survey, Rosewood has maintained that a reduction in the fine \$300 per day is warranted" Pet. Request for Review at 2. The reasonableness of the CMP amount is discussed below.

1. *The ALJ was correct in determining on summary disposition that Rosewood failed to comply substantially with the requirements of 42 C.F.R. § 483.13(c)(3), by waiting until after December 27, 2005 to investigate the cause of Resident #2's fractured clavicle.*

The ALJ determined that summary disposition was appropriate in this case by applying the principles for summary judgment set forth in Rule 56 of the Federal Rules of Civil Procedure and case law applying Rule 56.⁶ Under those principles, summary disposition is appropriate where there is no genuine dispute of material fact (where a "material fact" is one that might affect the outcome of the case), and the moving party is entitled to prevail under the applicable law. When a summary judgment motion is filed, a non-moving party may respond either by identifying material facts in dispute, or by contending that when the law is applied to the undisputed facts, the moving party is not entitled to judgment.

In determining that Rosewood failed to comply substantially with section 483.13(c)(3), the ALJ relied on the following undisputed facts:

On November 16, 2005, Resident #2 informed Rosewood's staff that she had injured her right shoulder by bumping it against her bathroom door frame.

Rosewood's staff investigated this episode, had the shoulder x-rayed, and notified the resident's physician and family of the resident's complaint.

The x-ray was negative.

Five days later, on November 21, 2005, the resident complained to Rosewood's staff about right lateral side pain and an irregular heartbeat.

Rosewood's staff sent the resident to the hospital and, later on that day, the hospital notified the staff that the resident had been admitted, suffering from congestive heart failure and a fractured right clavicle.

⁶ The ALJ had instructed the parties in advance that he would resolve all summary judgment motions under Rule 56 principles. Acknowledgment and Initial Pre-Hearing Order, dated June 29, 2006, at 4.

After learning of her broken clavicle from the hospital on November 21, Rosewood did not investigate the cause of Resident #2's broken clavicle until after December 27, 2005.

This investigation was prompted when a surveyor informed Rosewood's staff on December 27 that Resident #2 had complained to the surveyor about having her arms pulled by a member or members of Rosewood's staff.

ALJ Decision at 4 (citations omitted).

Based on these facts, the ALJ determined that Rosewood's failure to promptly investigate the cause of Resident #2's fractured clavicle when it was revealed by x-ray on November 21 was not justified by the fact that Rosewood had conducted an earlier investigation when she bumped her shoulder. ALJ Decision at 5. In the earlier incident, the x-ray was negative, so the ALJ found that Rosewood staff should have reasonably concluded that the broken clavicle was a new injury, albeit one of an unknown source. Id. The ALJ emphasized that they should have commenced an investigation of the clavicle injury immediately on November 21. Id. at 4-5.

In its request for review, Rosewood argues first that because a re-read of the November 16 x-ray of Resident #2's shoulder showed she might have had a broken clavicle on November 16, it was not required to conduct any additional investigation when it learned about her fractured clavicle from the hospital x-ray on November 21. It was undisputed that the re-read of the November 16 x-ray was not conducted until January 24; it was not even requested until after December 27. The re-read results read: "Comments (1/24/2006). On one projection there is a slight deformity of the right clavicle which does not preclude a fracture. Standard x-ray of the right clavicle advised for further evaluation." CMS Ex. 17, at 2. We note that this report is equivocal. In any case, as the ALJ pointed out, the results of an investigation after December 27, 2005 cannot explain the failure to investigate the cause of the injury when it was first discovered. ALJ Decision at 5. On November 21, 2005, when Resident #2 complained of right lateral side pain, Rosewood's administrators had no sound basis for concluding that she had broken her clavicle when she bumped into the bathroom door frame on November 16. Instead, they had a duty to investigate.⁷

⁷ In further support of its argument that Resident #2's
(continued...)

When the administrators at Rosewood learned of Resident #2's broken clavicle on November 21, even if they thought her clavicle might have been broken in the November 16 incident, they should not have assumed that it was; they were required to investigate immediately when and why it had broken. Section 483.13(c) requires thorough investigations of all alleged violations involving mistreatment, neglect, or abuse, including injuries (such as this one) of unknown source. An appropriate investigation initiated on November 21 might have included a prompt re-reading of her November 16 x-ray, interviews with the staff members who had been caring for her at Rosewood in recent days, interviews with Resident #2 herself (if possible) and/or family members who had visited her at Rosewood or the hospital,⁸ and consultation with her physician(s) at the hospital.

We have emphasized in previous cases that the duty to investigate under 42 C.F.R. § 483.13 applies even in cases where facility administrators have some reason to suspect what the cause of an injury may be. See Tri-County Extended Care Center, DAB No. 1936 (2004), aff'd, Tri-County Extended Care Ctr. v. Leavitt, 157 F. App'x 885 (6th Cir. 2005). Tri-County administrators had not investigated a hip fracture in one of its residents, instead inferring that because she had a history of osteoporosis and past compression fractures of her spine, the hip injury could be a spontaneous fracture. DAB No. 1936, at 19-20. CMS cited Tri-County for noncompliance with the requirements of 42 C.F.R.

⁷(...continued)

clavicle was broken in the fall against her bathroom door frame on November 16, Rosewood points to the evidence that she had a continuing complaint of shoulder pain on November 18 when she saw her physician at Rosewood. Pet. Request for Review at 9, citing CMS Ex. 14, at 12. However, this evidence does not establish that her clavicle was broken on November 16, particularly when the x-ray had been negative.

⁸ We note that Resident #2's daughter and son both stated that their mother had informed them on November 21 that she thought her collarbone had been broken the evening of November 20 when an aide at Rosewood lifted her under her arms to transfer her to bed, despite her request that he not do so. Declaration of JCS, CMS Ex. 54, at 2, ¶¶ 6-8; Declaration of DPW, CMS Ex. 55, at 1, 2, ¶¶ 4, 7. Rosewood proffered no evidence to contradict these declarations, and the declarations suggest that interviews with Resident #2 or her family members might well have provided important information had a prompt investigation been undertaken after her broken clavicle was discovered.

§ 483.13(c). Both the ALJ and the Board upheld that finding, reasoning that the assumptions and inferences of the facility's administrators were inadequate to substitute for a thorough, prompt investigation. Id.; see also Britthaven, Inc., DAB No. 2018, at 13 (2006) ("[M]ere conclusory assumptions about the cause of an injury do not evidence a thorough investigation.").

Nevertheless, Rosewood argues that when the ALJ granted summary disposition for CMS based on Rosewood's failure to promptly investigate the November 21 clavicle break, the ALJ was relying unfairly on an "interpretation of the facts" adverse to Rosewood. Pet. Request for Review at 9. In this case, however, all of the facts relating to the failure to investigate promptly were undisputed. The ALJ did not interpret the facts, nor did he draw any inferences from them. Rather, he applied the law (42 C.F.R. § 483.13(c)) to the facts. He determined as a matter of law that section 483.13(c) requires that each and every violation or incident of potential abuse, neglect, or mistreatment be promptly and thoroughly investigated, including those involving injuries of unknown origin. The ALJ's conclusion that the broken clavicle injury in this case was "of unknown source" was based on the undisputed fact that Rosewood had no basis to attribute its source to the earlier incident given that the earlier x-ray was negative. ALJ Decision at 5. An investigation was required, therefore, even if Rosewood administrators assumed they could guess the likely outcome of the investigation. Applying these principles to the undisputed facts here, the ALJ found that Rosewood had failed to immediately and thoroughly investigate Resident #2's broken clavicle as required by section 483.13(c). In short, we hold that the ALJ did not err in concluding that Rosewood could not properly assume the earlier incident explained the later-discovered injury, without at least inquiring into any possible intervening causes.⁹

⁹ Rosewood also claims that it was "at least" entitled to cross-examine the IDPH surveyor "to call into question the credibility of [his or her] professional opinion that Rosewood was not in substantial compliance with participation requirements stated at [section] 483.13(c)(3)." Pet. Request for Review at 9-10. This claim misconceives the basis for the ALJ's ruling that Rosewood was not in substantial compliance with section 483.13(c)(3). As explained above, the ALJ reached this conclusion by applying the regulation to the undisputed facts. The ALJ did not need, cite, or rely on the professional opinions of IDPH surveyors Judith Cimino and Antonio Gaffud, contained in their declarations (CMS Exs. 20 and 48).

Second, Rosewood argues that it did in fact conduct a further investigation beginning just after December 27, when it learned from an IDPH surveyor that Resident #2 had complained that she had been pulled by the arms by facility staff. Pet. Request for Review at 6. The difficulty with this assertion is that it was Rosewood's responsibility to investigate her broken clavicle injury beginning on November 21, when Rosewood first learned of the injury from hospital staff members aware of the x-ray results. Rosewood should not have waited until it heard about Resident #2's complaint on December 27. The regulation explicitly requires that alleged violations, including injuries of unknown source, be reported immediately, and that the results of investigations be reported within five working days. Section 483.13(c)(2) and (c)(4). Rosewood took no action for approximately five weeks after being notified of Resident #2's injury, far beyond the five-day time frame provided for an investigation pursuant to section 483.13(c)(4). Additionally, the investigation that Rosewood did begin around December 27 appears to have taken a month or more, since the re-read of the x-ray did not occur until January 24. These types of delays can compromise the quality of the investigation and expose other nursing facility residents to whatever underlying risks remain undetected and unaddressed in the meantime.

For the foregoing reasons, we find that the ALJ committed no error in concluding that Rosewood was not in substantial compliance with 42 C.F.R. § 483.13.

2. The ALJ was correct in his determination that CMPs of \$300 per day were reasonable for the January 6 - March 2, 2006 period.

The ALJ upheld CMS's imposition of \$300 per day in CMPs, pursuant to 42 C.F.R. § 488.438(a)(1)(ii). ALJ Decision at 7. Section 488.438(a)(1)(ii) provides for CMPs in the range of \$50 to \$3,000 per day for deficiencies that do not constitute immediate jeopardy, but either cause actual harm, or cause no harm but have the potential for causing more than minimal harm.

In its request for review, Rosewood contends that it should not be assessed a CMP for the period January 6 to February 9, 2006 (the date of the second survey) because it was in full compliance during that period. Pet. Request for Review at 2. However, as we have explained above, the undisputed facts demonstrate that Rosewood was not in substantial compliance with 42 C.F.R. § 483.13(c) (duty to investigate) during that period.

Rosewood also argues that although it has not contested CMS's findings of noncompliance based on the February 9, 2006 survey, a reduction in the CMPs of \$300 per day is warranted since the deficiencies found in that survey were "at a low scope and severity." Pet. Request for Review at 2. Rosewood made essentially the same argument before the ALJ, claiming that its noncompliance was minimal and caused no actual harm. ALJ Decision at 7. The deficiency findings included repeated failures to take measures to protect residents from the spread of hazardous infections (§ 483.65(b)(1)); failing to train three staff members adequately in implementation of its anti-mistreatment, neglect, and abuse policies (§ 483.13(c)); failing to develop comprehensive resident care plans timely (§ 483.20(k)(2)(i)); failing to develop recipes for safe pureed food for residents requiring it (§ 483.35); and leaving prescription medications, other hazardous substances and objects, and unsecured oxygen tanks in residents' rooms (§ 483.25(h)(1)). ALJ Decision at 5-6.

The ALJ rejected Rosewood's argument for reduced CMPs based on its claim that the deficiencies were limited in number and did not cause actual harm. He noted at the outset that the \$300 per-day amount is very modest, comprising only ten percent of the maximum allowable daily amount for non-immediate jeopardy level deficiency penalties. ALJ Decision at 7. He then explained his reasoning in these terms:

CMS asserts that . . . [the deficiencies] show that Petitioner failed to create a safe environment for its residents.

*

*

*

*

. . . CMS's findings are not premised on the presence of actual harm, nor is actual harm a necessary prerequisite in this case for the imposition of civil money penalties. CMS based its findings of noncompliance and its penalty determination on the existence of deficiencies that establish a high *potential* for harm.

*

*

*

*

. . . So long as Petitioner remained deficient, the probability existed that someone would be harmed, sooner or later. For example, the presence of numerous accident hazards in Petitioner's facility – such as unsecured bottles of oxygen and containers of prescription drugs – created a probability that, eventually, an accident would occur with serious consequences.

I find that the deficiencies established by CMS are, in and of themselves, sufficiently serious to support the imposition of the very modest penalties that are at issue here.

Id. at 7-8 (italics in original). Therefore, the ALJ sustained the penalty amount of \$300 per day. Id. at 8. We concur, finding that this result is supported by substantial evidence in the record.¹⁰

Accordingly, we affirm the CMPs of \$300 per day from January 6 to March 2, 2006, based on Rosewood's noncompliance with 42 C.F.R. § 483.13(c) in the January survey, and its noncompliance with the five conditions of participation listed in the February survey.

Conclusion

We affirm the ALJ Decision in full, and sustain the CMPs of \$300 per day from January 6 through March 2, 2006 (totaling \$16,800). In so doing, we affirm and adopt all of the FFCLs made by the ALJ.

Judith A. Ballard

Constance B. Tobias

¹⁰ The regulations also provide additional factors to be weighed in determining the amount of CMPs, including the facility's history of noncompliance, financial condition, and culpability. 42 C.F.R. § 488.438(f). Rosewood did not submit any evidence or argument to the ALJ or the Board as to how its compliance history or financial status would justify reducing the CMP amount. What evidence does appear in the record on these factors, which CMS provided, simply tends to support the reasonableness of the amount. See CMS's Pre-Hearing Brief at 15-16; CMS's Motion for Summary Disposition at 13-15; CMS Exs. 52 (compliance history), 53 (financial status).

Leslie A. Sussan
Presiding Board Member